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IN THE COURT OF APPEALS OF INDIANA

ANDREW STACY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0510-CR-499
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0404-FB-27

August 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Andrew Stacy appeals his convictions of neglect of a dependent.[1] He raises two issues, which we restate as:

1. Whether the evidence was sufficient to convict Stacy of neglect of a dependent as a Class B or C felony; and

2. Whether the trial court erred in imposing consecutive sentences.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Stacy and his wife Kelly were the parents of four children, K.S., A.S., H.S. and T.S. On December 15, 2003, Stacy and Kelly took four-month-old K.S. to the emergency room, where she was pronounced dead on arrival. Stacy told police he had given K.S. a bottle and put her down to sleep. When Kelly arrived home from work several hours later, she found K.S. dead.

When police arrived at the Stacys' house to investigate K.S.'s death, "[t]he house was in a complete state of disarray. There was [sic] clothes and dirty clothes, garbage, rotting food everywhere in the living room and also there was a smell stench [sic] of garbage and rotting food throughout the house." (Tr. at 60.) "The kitchen from the living room area, looking into the kitchen, you could see the rotting food on the stove, countertops, everywhere. Garbage was literally piled from the countertop to the cabinets, on the floors, everywhere within the place." (*Id.* at 61.) The officers noted the smell of sewage in the residence. When they

[1] Ind. Code § 35-46-1-4.

arrived, Kelly's father was using a snow shovel to move trash from the floor into a garbage can. He told police "he had shoveled a path for us." (*Id.* at 122.)

Officers found a blood spot on the bed where K.S. had been sleeping. The Stacys' three other children, A.S., H.S. and T.S., were at a neighbor's house. The children had lice, were dirty and unkempt, and were not wearing shoes or socks. A.S., H.S. and T.S. were taken into the custody of Child Protective Services.

Stacy was charged with neglect of a dependent as Class B and Class C felonies for "knowingly or intentionally [placing] [K.S.] in a situation that endangered [K.S.'s] life or health which resulted in serious bodily injury to [K.S.]." (App. at 8.) He was also charged with four counts of neglect of a dependent as a Class D felony for placing K.S., A.S., H.S. and T.S. in a situation that endangered their lives or health. A jury found Stacy guilty on all counts.[2]

The trial court merged[3] the Class C and Class D felony convictions related to K.S. into the Class B felony conviction and sentenced Stacy to consecutive sentences totaling eleven years. Additional facts will be provided as necessary.

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[2] Stacy does not challenge on appeal the Class D felony convictions.
Kelly was also charged with and convicted of Class B felony neglect of a dependent based on K.S.'s death. A different panel of this court in *Stacy v. State*, No. 45A03-0510-CR-500 (Ind. Ct. App. August 25, 2006), also affirmed in part, reversed in part, and remanded.

[3] The court's sentencing order provided judgments of conviction were entered for Counts one through six. It then stated "The Court merges Counts III [the Class D felony count related to K.S.] and II (the Class C felony count] into Count I [the Class B felony count] based on double jeopardy consideration." (App. at 39.)
A double jeopardy violation occurs when judgments of conviction are entered, and it cannot be remedied by merger after conviction has been entered. *Jones v. State*, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 969 (Ind. 2004). We explained in *Kochersperger v. State*, 725 N.E.2d 918, 925-26 (Ind. Ct. App. 2000), that where the trial court had "merged" two

DISCUSSION AND DECISION

1. Sufficiency of Evidence to Support Class B and Class C Felony Convictions

Stacy argues the evidence was insufficient to show he knowingly or intentionally placed K.S. in a situation that resulted in bodily injury or serious bodily injury to K.S. We agree.

A person having the care of a dependent, who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health, commits neglect of a dependent. Ind. Code § 35-46-1-4. The offense is presumptively a Class D felony, but it is a Class C felony if it results in bodily injury, a Class B felony if it results in serious bodily injury, and a Class A felony if it is committed by a person at least eighteen years old and results in the death of a dependent who is less than fourteen years old. *Id*.

When the sufficiency of the evidence to support a conviction is challenged, we neither reweigh the evidence nor judge the credibility of the witnesses. *Wright v. State*, 828 N.E.2d 904, 905-06 (Ind. 2005). We affirm if there is substantial

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offenses, imposed one sentence, but entered judgment of conviction on both offenses, one of the offenses must be vacated to comport with double jeopardy. A conviction even without a sentence is in violation of double jeopardy and must be vacated. *Id*. While the record reflects the trial court "merged" Count III and II into Count I and sentenced Stacy only on Count I, it entered judgment of conviction on all the counts. In so doing, however, the trial court noted "double jeopardy consideration."

It is apparent the trial court did not intend to punish Stacy multiple times for the offenses related to K.S. in violation of double jeopardy principles, and it attempted to avoid such a result through "merger." However, the trial court should have vacated the convictions that would have subjected Stacy to double jeopardy instead of merely "merging" them into Count I. See *id*. Accordingly, as explained below, we direct the trial court on remand to vacate Stacy's Class B and C felony convictions, leaving a single Class D felony conviction with regard to K.S. and each of the other three children.

evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*. at 906. It is up to the factfinder to determine whether the evidence in a particular case sufficiently proves each element of an offense, *id*., and we consider conflicting evidence most favorably to the trial court's ruling. *Id*.

To prove Stacy acted knowingly, the State had to show he was "subjectively aware of a high probability that he placed the child in a dangerous situation." *Sanders v. State*, 734 N.E.2d 646, 650 (Ind. Ct. App. 2000), *trans. denied* 741 N.E.2d 1258 (Ind. 2000). The danger to the child must be "actual and appreciable":

> It seems clear that to be an "actual and appreciable" danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child. This is consistent with a "knowing" mens rea, which requires subjective awareness of a "high probability" that the dependent has been placed in a dangerous situation, not just any probability.

Gross v. State, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004).

Dr. Sylvia Vicente, K.S.'s pediatrician, testified she saw K.S. on October 3, 2003, for her two-month checkup. She diagnosed K.S. as suffering from an ear infection and noted some "chest crackling sounds." (Tr. at 41.) Dr. Vicente ordered a chest x-ray, which showed no pneumonia. She believed K.S. was suffering from "more of a bronchitis kind of picture." (*Id.* at 42.) The doctor administered a nebulizer treatment at her office "to help open up the airways,"

(*id*.), and gave the Stacys a nebulizer machine to use at home.[4] She prescribed antibiotics for an ear infection, which medication the Stacys testified they administered to K.S.

K.S. was to return for a follow-up visit on October 6, 2003, but she failed to appear. Dr. Vicente called the Stacys' telephone number and talked to Stacy's father, who told her "he saw the baby that day and the baby looked fine and [the Stacys] probably forgot about the appointment." (*Id.* at 45.) Dr. Vicente directed him to tell the Stacys to bring K.S. to her office for a follow-up and for vaccinations.[5] The Stacys never took K.S. back to Dr. Vicente, missing appointments on October 24, 2003, and November 2, 2003. Dr. Vicente was not asked at trial whether K.S.'s death was related to her illness on October 3, 2003, or the Stacys' failure to bring K.S. to subsequent appointments.

Dr. John Cavanaugh, a forensic pathologist, performed an autopsy on K.S. He testified:

> Q. And did any of those examinations impact on your finding of what caused the death of this child?
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> * * * * *
>
> A. Well, I was able to look at the inflamed, the tissues of the inflamed airways under the microscope and there, you know, there was evidence of chronic inflammation. Then I was looking, essentially three distinct but related processes. One is a tracheal bronchitis which is the inflammation of the trachea and the bronchi. The other is interstitial pneumonitis, which would be an inflammation of the lung tissue itself, that

[4] Stacy testified he and Kelly used the nebulizer at home.

[5] The parties do not direct us to evidence as to whether the message was delivered to the Stacys.

can be separate or it can be a continuation of the tracheal bronchitis. And then there was something that I saw on the microscope that kind of goes along with my description of the gross examine [sic] is bronchopneumonia. This is actual pus coming out into the air sacs of the lungs and is a distinct disease process, in whereas the tracheal bronchitis and the interstitial pneumonitis are considered kind of like the same thing, just in different areas. The bronchopneumonia is distinctly different. It has different sets of causes and affects, [sic] et cetera.

Q And what would that be?

A. Well, tracheal bronchitis can be caused by bacteria, but generally it's viral. Mycoplasma is your second most common cause. This would be, you know, tracheitis, bronchitis. In adults we have it, but, you know, the interstitial pneumonitis can be seen as viral pneumonia or walking pneumonia caused by mycoplasma. The bronchopneumonia is different, that's far more likely to be caused by bacteria or bacterial pneumonia. It can lead into lobar pneumonia, which is far more serious condition than say the interstitial pneumonitis.

Q. Why is the bacterial pneumonia a more serious form of pneumonia?

A. Well, it tends to have a much higher of [sic] incidence of mortality than does the interstitial pneumonitis.

* * * * *

Q. Doctor, within the bounds of reasonable medical certainty, what caused the death of [K.S.]?

A. In my opinion, cause of death was pneumonia, composed of tracheal bronchitis, interstitial pneumonia and bronchopneumonia, all three types.

Q. You also noted in your report a probable sepsis?

A. Correct.

Q. What is that and how did that play into or factor into this?

A. Sepsis is, if you use a laymen's term blood poisoning. It's when bacterial toxins get into the bloodstream and can cause an overwhelming shock reaction in the body. This is kind of an educated guess. Obviously, I can't see sepsis, you can in living [patients], but my findings are consistent with sepsis and that goes along with any death due to infectious process.

Q. What were the contributing factors then to the child's death?

A. Contributing factors, of course, would be the initial tracheal bronchitis, which could have been on-going for, you know,

chronically or, you know, over the course of several days or even weeks. Then the bronchopneumonia would have been superimposed upon this. Another possible contributory factor is the possibility of positional affixation.[6]

Q. What does that mean?

A. Positional affixation is where there's restriction of breathing caused by the child's environment. The blanched livor mortis implied that the baby was faced down at least at the time of her or immediately following death. This could be associated with death. Whether it's too many blankets or the wrong surface, other, you know, items in the sleeping area restricting the baby from moving or breathing.

* * * * *

Q. With the level of infection that you found within the child, how would this child or what symptoms would this child have presented?

A. Well, I'm going to have to look at this condition in three phases, early, late and then everything in between. Early phase, in my opinion, would have been just the tracheal bronchitis which would have been, you know, your typical flu symptoms, runny nose, maybe fever, maybe not, cough, generally a dry cough because there isn't a lot of mucus production by that. You're basically coughing because your mucus membranes are swollen and your body senses there's something there but you can't get rid of it. Middle stages would be the onset of bronchopneumonias, you would have actually had something coming up, been associated with maybe fever and chills. Bronchopneumonia is usually bacterial. And then the third stage, which would have been the sepsis stage, which would have been actually the body temperature goes down, the body's very sick, everything is basically shutting down. They're cold, chills predominate. There might not be a coughing because you're just not responding as well to your internal environment. So, this is basically circling the drain, as we referred to in medicine. So this would be the third phase, the dying phase of sepsis. And sepsis has, even in a hospital intensive care has a mortality rate of fifty percent. This would have been a extremely sick

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[6] The witness was presumably referring to positional *asphyxiation*, which occurs when body position interferes with breathing, resulting in suffocation. *See* http://siri.uvm.edu/library/topics/chemsafety/Pepper_Mace (last visited April 24, 2006).

> individual. They would just lie there quietly, shallow breathing. So these are the three phases so that the symptoms would have changed as you went from one phase to the next.

(*Id*. at 196-202.)

Dr. Cavanaugh did not testify as to when the second and third phases would have begun, *i.e*., weeks, days, or hours before death, or how long those phases might continue. Nor did he offer an opinion as to how long K.S. had been ill. He opined it was "probable," K.S. suffered from sepsis but he testified "[s]epsis is a strictly clinical diagnosis and can only be made in a living body." (*Id.* at 211.) He also testified K.S. would have been able to eat: "At least in the early stages, yes. Often, however, with kids, you know, very ill, you know, if anything, you'll see a decrease in appetite." (*Id.* at 210.) Dr. Cavanaugh found partially digested milk or dairy products in K.S.'s stomach, indicating "death occurred shortly after a meal." (*Id.* at 194.) This suggests K.S. was not "very ill" shortly before she died.

Like Dr. Vicente, Dr. Cavanaugh was not asked whether K.S.'s death was related to her condition on October 3, 2003.[7] Nor did he express an opinion whether K.S. would have survived had she received prompt medical attention.

The State presented no evidence of a relationship between K.S.'s condition on October 3, 2003 and her death or of the likely time progression of K.S.'s disease. We must accordingly find the State did not carry its burden to prove

[7] As neither medical expert was asked this question, we may not assume the answer to this question would have been "yes."

Stacy had awareness of a "high probability" he had placed K.S. in a situation of "actual and appreciable" danger. *See Gross*, 817 N.E.2d at 309.

The conditions the Stacys' children were found in were chilling. Still, we cannot infer those conditions caused K.S.'s death. The State has offered ample evidence K.S. was neglected, but not to the extent required for a conviction of a Class B or C felony. We must accordingly vacate Stacy's convictions of neglect of a dependent as Class B and C felonies.

2. Consecutive Sentences[8]

Stacy notes the trial court did not find aggravating circumstances, and argues his sentences therefore should not have been ordered served consecutively. The trial court ordered: "the sentence of imprisonment is to be served consecutive to each other for a total of eleven (11) years for the reason that it is discretionary, and is being imposed because there are multiple victims involved."

As we have ordered vacated Stacy's Class B and C felony convictions, we are left with his convictions of multiple Class D felonies. Stacy was sentenced to one year on each, a sentence less than the presumptive sentence of one and one-half years. He asserts a trial court may not impose less than the presumptive sentence on each count yet order the multiple reduced sentences served consecutively.

[8] While we find consecutive sentences were not error, we direct the sentencing court on remand to modify Stacy's sentence in accordance with our vacation of the Class B and C felony convictions.

Stacy directs us to *White v. State*, 847 N.E.2d 1043, 1047, (Ind. Ct. App. 2006). There, we held it was an abuse of discretion to order White's sentences served consecutively when the trial court "did not explain why the balancing of the aggravators and mitigators justified the imposition of consecutive minimal sentences . . . ." *Id*. As there was no explanation, "its implicit balancing of the aggravators and mitigators led it to impose sentences shorter than the presumptive." *Id*.

Stacy's sentencing judge, by contrast, did explain why "consecutive minimal sentences" were justified; Stacy's sentences were to be served consecutively because there were multiple victims. When Stacy was charged, Ind. Code § 35-38-1-7.1 listed a number of factors that could be considered as aggravating circumstances. Multiple victims was not included in the list, but multiple victims is recognized as a proper aggravator. *See, e.g.*, *Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005) (Estes committed the offenses against two victims, so at least one consecutive sentence was appropriate); *French v. State*, 839 N.E.2d 196, 197 (Ind. Ct. App. 2005) (trial court properly based imposition of consecutive sentences on the fact multiple victims had suffered), *trans. denied*.

Ind. Code § 35-38-1-7.1 did not require that a factor be found as an aggravating circumstance before a consecutive sentence could be ordered. Rather, it stated only that certain factors may be considered as either aggravating circumstances *or* as favoring imposing consecutive terms. (Emphasis supplied.) We noted in *White* that "We do not intend to imply a trial court cannot ever order

presumptive sentences, or even reduced sentences, served consecutively. If a court finds the aggravators outweigh the mitigators such that consecutive sentences are appropriate, the court still may order presumptive or reduced sentences." 847 N.E.2d at 1046 n.5. That is the situation before us. The trial court did not err in ordering consecutive sentences.

Affirmed in part, reversed in part, and remanded for resentencing.

SULLIVAN, J., and BAKER, J., concur.